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No. 92-5129

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOHN L. SULLIVAN,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF LOUISIANA

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The brief of the State of Louisiana is remarkable chiefly for its concessions and its contradictions. Although the State acknowledges in passing the Sixth Amendment right to a determination of guilt by a jury, Resp. Br. at 7, it altogether ignores the concomitant proscription against judicial determinations of guilt, and the leading cases of this Court which apply that principle.1/ Rather than addressing the question

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1/ *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395 (1947); *Bollenbach v. United States*, 326 U.S. 607 (1946).

presented herein, for the most part the State engages instead in a lengthy comment on this Court's recent unanimous decision in *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam), but then expressly disclaims any interest in seeking reconsideration of *Cage*. Resp. Br. at 22. And although it asserts that harmless error analysis is appropriate even for an error that reduces the state's core burden of proof, it makes no attempt to articulate or apply such an analysis to this case. That it made no attempt to do so, and made no response at all to Petitioner's Sixth Amendment arguments, is telling evidence that such an analysis cannot be undertaken without doing violence to Petitioner's Sixth Amendment right to have his guilt or innocence decided by a jury constitutionally instructed on the standard of proof.

ARGUMENT

The State concedes that the instruction on reasonable doubt given here was erroneous and ambiguous. Resp. Br. at 7-8. The State further concedes that at least some instructional errors which reduce the government's burden of proof would not be subject to harmless error analysis and, thus, would automatically invalidate a conviction. Resp. Br. at 11. But the State fails to offer any basis, let alone a constitutionally principled one, for distinguishing those errors in defining the burden of proof that are subject to harmless error analysis from those that are not. The State simply "suggests," Resp. Br. at 11, without analysis, that the error here is subject to harmless error review.

What the State fails to realize is that its concession that at least some instructional errors on burden of proof are not subject to harmless error review must ultimately stem from Sixth Amendment limitations. The constitutional concern with an erroneous reasonable doubt instruction is not merely the Due Process Clause violation of using the wrong standard of proof. The Sixth Amendment's requirement that *a jury* make the guilt determination circumscribes the remedy for the Due Process Clause violation and prevents a reviewing court from "curing" the defect by substituting its view of the evidence for that of a jury properly instructed on reasonable doubt. It is thus the Sixth Amendment which makes harmless error review constitutionally inapplicable, not just to some instructional errors on the standard of proof as admitted by the State, but to all such errors where factual guilt is contested. Where the reasonable doubt instruction is constitutionally erroneous, it is impossible for a reviewing court to determine whether the jury found guilt, or any element thereof, beyond a reasonable doubt. A reviewing court thus lacks any of the guideposts which permit harmless error analysis of other types of instructional error. *See Rose v. Clark*, 478 U.S. 570, 579-81 (1986).

The State devotes the bulk of its brief to various remarks concerning this Court's decision in *Cage*. These comments, it may be noted, are little more than a reprise of the arguments raised by the State in its briefs in *Cage* and already rejected by this Court.[2/] Taking the State at its

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2/ It may also be noted that the State's concern that the *Cage* decision itself, and its principled application here, displace many years of established law, and the State's contention that these decisions will have far-reaching effect, are both overstated and irrelevant. While those considerations may have some relevance to a retroactivity analysis in a future case, they do not apply to this case, which comes before the Court on direct review. (It bears noting that both the Louisiana Supreme Court and the United States Courts of Appeals for the Fourth and Fifth Circuits have rejected retroactive applications of *Cage*. *Louisiana ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992); *Skelton v. Whitley*, 950 F.2d 1037, 1043-46 (5th Cir.), *cert. denied*, 113 S. Ct. 102 (1992); *Adams v. Aiken*, 965 F.2d 1306, 1311-12 (4th Cir. 1992), *petition for cert. filed*, (U.S. Oct. 14, 1992) (No. 92-6259).) Moreover, under Louisiana's contemporaneous objection rule, *Louisiana v. Dobson*, 578

word that it is not seeking reconsideration of *Cage*, Resp. Br. at 22,3/ this argument is apparently now to be understood as an attempt to justify harmless error review of a constitutionally defective reasonable doubt instruction.

Reduced to its essence, the State's argument is that the language found erroneous in *Cage* is not so bad after all, so its use must have been harmless. The State first argues that the instruction is not all that erroneous because the term "reasonable doubt" was used in the instruction, and it has a meaning which is commonly

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So. 2d 533 (La. Ct. App.), *writ denied*, 588 So. 2d 1110 (La. 1991), *Cage* will apply to but a limited number of decisions still on direct review. *See* J.A. at 47 (Dennis, J., dissenting).

3/ The issue whether the reasonable doubt instruction given in this case was constitutionally erroneous is not properly before the Court in any event. In the Louisiana Supreme Court, the State conceded the similarity of the instructions and did not argue that the present instruction was not constitutionally erroneous. J.A. at 26; Original Brief of Appellee at 20. The Louisiana Supreme Court held the instruction erroneous, J.A. at 26-28, and the State did not petition or cross-petition this Court for review, nor petition the Louisiana Supreme Court for rehearing, on this issue. Finally, in its Brief in Opposition to Certiorari filed in this Court, the State conceded: "the jury's instruction on reasonable doubt during the guilt phase of the trial was constitutionally deficient under the standard of *Cage v. Louisiana*, 111 S. Ct. 328 (1990) (per curiam)." Br. Opp. at 2.

Similarly, the State overstates the import of footnote 4 of *Estelle v. McGuire*, 112 S. Ct. 475, 482 n.4 (1991), in which the Court merely clarified and reaffirmed the proper language for articulating the standard for determining whether an instruction is erroneous, which standard it had stated in *Boyde v. California*, 494 U.S. 370, 380 (1990), well before the decision in *Cage*. *See McGuire*, 112 S. Ct. at 482 n.4 ("we now disapprove the standard of review *language* in *Cage* and *Yates*, and reaffirm the standard set out in *Boyde*.") (emphasis added). There is no suggestion in the *McGuire* footnote that the Court questioned the holding of either of the two cases mentioned as having been imprecise in the language used for articulating the standard.

understood. Resp. Br. at 18-19. Putting aside the question of whether reasonable doubt is actually a "commonly understood" term and whether any "common understanding" comports with the degree of certainty required by the Due Process Clause, this argument ignores the fact that within the instruction this "commonly understood" term was erroneously defined. Since it must be presumed that the jury followed the complete instruction, *see, e.g., Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991), including the erroneous definition, the instruction essentially took from the jury any "common understanding" of the term and put in its place a definition that speaks in terms of "grave" and "substantial" doubt coupled with "moral" certainty. It must therefore be presumed that, whenever the jury evaluated evidence, it did so not against a common understanding of reasonable doubt but rather against the standard as defined. Because that standard as defined was constitutionally infirm, there remains no jury finding made to a constitutionally acceptable standard and thus no benchmark against which any harmless error analysis could be made. That the term "reasonable doubt" was used in the instruction, but then improperly defined away, thus adds nothing to make harmless error analysis constitutional here.

It may also be noted that the State's parsing of the language of the instruction only considers the erroneous terms individually. While the use of certain terms, considered individually, may not have been held erroneous in other contexts, the State cites no case where any court, let alone this Court, considered and upheld the *combination* of improper terms found unconstitutional in *Cage*. It was precisely this combination of erroneous terms working together ("grave uncertainty" and "actual substantial doubt . . . considered with the reference to 'moral certainty,' rather than evidentiary certainty," *Cage*, 111 S. Ct. at 329-30) that permitted the jury to interpret

"the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 330.

For all of Respondent's rhetoric that the instructional error in this case may be quantitatively assessed, the simple fact is that neither the State nor any reviewing court is able to say that guilt, or any element thereof, was actually found by the jury beyond a reasonable doubt. Because of the Sixth Amendment's guarantee of Petitioner's right to have the determination of guilt beyond a reasonable doubt made by a jury, that simple fact is dispositive of the question presented here.

CONCLUSION

The judgment affirming Petitioner's conviction should be reversed and the case remanded for a new trial.

Dated: February 3, 1993

Respectfully submitted,

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